STRAITS SETTLEMENTS REPORTS.

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[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J., THOMAS, C.J. (F.M.S.) & HORNE, J.

RE SHAIK DAWOOD BIN SAID BAJERAI.... Appellant.

EXPARTE SHAIK SAHIED BIN TALIP BIN JAAFAR BIN TALIP.. Creditor (Respondent).

[SINGAPORE APPEAL No. 1 of 1937].

Bankruptcy Notice—application to set aside —hearing—notice withdrawn by creditor—notice of intention to withdraw given before hearing —appearance of debtor's counsel at hearing— whether necessary—order disallowing costs— appeal—time—computation of—Civil Procedure Rules, 1934, O. 55 r. 6(3); Interpretation Ordinance (Cap. 2), S. 3 (d).

A debtor applied to set aside a bankruptcy notice issued against him. On the date fixed for hearing of the application debtor's counsel would be engaged elsewhere. He therefore wrote to the creditor's solicitors to arrange a week's adjournment. In reply, the creditor's solicitors wrote to say that an adjournment would be unnecessary as they themselves would apply at the hearing to have the notice set aside. At the hearing another counsel, instructed by the first counsel, appeared for the debtor and applied for costs. The application for costs was opposed by counsel for the creditor. The Judge made an order setting aside the bankruptcy notice but disallowed the costs without specifying antecedent costs or costs of the day, as he had held that appearance of debtor's counsel at the hearing was unnecessary. The debtor applied to vary his order so far as it affected the question of costs. The Judge refused to vary his order. The debtor appealed to the Court of Appeal. The Memorandum of Appeal was filed on the 31st day of May 1937 and the sittings of the Court of Appeal commenced on the 14th June 1937.

Held, over-ruling a preliminary objection that the appeal was out of time, that the expression "fourteen days" in Order 55 rule 6 (3) of the Civil Procedure Rules, 1934, means fourteen clear days, that is, exclusive of the first and last days and that as the last day for filing the Memorandum of Appeal fell on the 30th May 1937, a Sunday, the Memorandum was, according to section 3(d) of the Interpretation Ordinance, properly filed on the 31st May 1937.

Held further, that in the circumstances of the case, the attendance of counsel for the debtor at the hearing of the application to set aside the bankruptcy notice was necessary and proper and that as costs usually follow the event and the Judge did not exercise his discretion to disallow the debtor's costs antecedent to the hearing, the Court of Appeal had power to allow such costs including the costs of the hearing.

APPEAL.

The facts and arguments appear sufficiently from the Judgment below.

De Mello, for the appellant.

Smith, for the respondent.

Cur. Ad. Vult.

The Judgment of the Court of Appeal (Terrell, Ag. C.J., Thomas, C.J., (F.M.S.) and Horne, J.) was delivered by—

TERRELL, AG. C.J.—On the 15th April 1937 the respondent issued a bankruptcy notice in respect of a judgment debt for $4,445.23 due by the appellant.

On the 20th April 1937 the appellant applied to set aside the notice by filing an affidavit to the effect that he had a counterclaim or cross-demand for $7,500. He also alleged that the judgment was not a final judgment. The hearing of the appellant's application was fixed for the 30th April 1937.

On the 24th April 1937 Mr. de Mello, the appellant's solicitor, wrote to Messrs. Donaldson & Burkinshaw, the respondent's solicitors, asking for a week's postponement on the ground that he was engaged elsewhere. On the same day Messrs. Donaldson & Burkinshaw replied to the effect that a postponement was unnecessary as they would themselves apply on the 30th to have the bankruptcy notice set aside and they undertook to do so. Nothing was said as to the costs of the application. On the 30th April Mr. Paulusz was instructed at the last moment by Mr. de Mello to appear in Court and ask for costs. Mr. Smith, for the judgment creditor, consented to the Bankruptcy Notice being set aside and Mr. Paulusz agreed, and asked for costs. Mr. Smith opposed the application for costs and the learned Acting Chief Justice made no order for costs. In the learned Acting Chief Justice's grounds of judgment it appears that he was under the impression that the only dispute was as to the costs of the day and he formed the opinion that, as Messrs. Donaldson & Burkinshaw had undertaken to withdraw the Bankruptcy Notice, no appearance by counsel for the debtor was necessary. In the learned Acting Chief Justice's notes, however, there is no indication that Mr. Paulusz was only asking for the costs of the day, and it would appear therefore that there was a misunderstanding on the point.

On the 5th May 1937 Mr. de Mello applied, that the order, so far as it related to costs, be reviewed. On the hearing of this application Mr. Smith argued that the debtor was under a statutory obligation to satisfy the Court that he had a cross-demand, that this provision was for the benefit of the debtor, and that he was not entitled to costs as of right. The learned Acting Chief Justice accepted this argument, and stated in his grounds of judgment that he had disallowed the appellant any costs on the ground that the appearance of counsel on the 30th April was unnecessary in view of Messrs. Donaldson & Burkinshaw's undertaking. He added that if Mr. Paulusz had asked for costs antecedent to the hearing in Court he might have allowed them. He refused, however, to vary his order as Mr. de Mello had produced no new material or arguments which were not available at the previous hearing. With all respect to the learned Acting Chief Justice it

would appear that he had in mind section 579 of the F.M.S. Civil Procedure Code which especially provides that a judgment of the Supreme Court can only be reviewed on "the discovery of new and important matter or evidence." The power to review, however, under section 90 of the Bankruptcy Ordinance is unfettered in this way. (See *In re Tobias & Co.*, 8 Morrell p. 30 at p. 34). In the present case where there had obviously been a misunderstanding, it would appear eminently to have been a case upon which the learned Acting Chief Justice might have reviewed his previous order.

On his refusal to do so the debtor gave notice of appeal, and in such notice he included an appeal both against the original order of the 30th April (so far as it related to costs) and against the refusal to review. The respondent thereupon applied to the Court of Appeal for a second security for $500 on the ground that there were in substance two appeals. Mr. de Mello countered this by asking to amend his Notice of Appeal so as to make it appear that he was only appealing against the refusal to review. His substantial grievance, however, was clearly against the original order, and at the hearing of the interlocutory application, Mr. de Mello was given leave to amend his notice of appeal so as to confine it to the original order. Mr. Smith thereupon withdrew his application for further security; the appellant, however, was ordered to pay all the costs of the interlocutory proceedings.

The appeal against the original order then proceeded, and Mr. Smith took the preliminary objection that the appeal was out of time, the memorandum having been filed on the 31st May 1937 and the sittings of the Court of Appeal being fixed for the 14th June 1937.

Order 55 rule 6 (3) provides as follows:

"The Memorandum and the copies above referred to, which together shall be called the record of appeal, shall be filed not less than fourteen days before the sitting of the Court of Appeal."

Now there are no general rules either in England or in the Colony for the computation of time except in certain cases where a Sunday or other *dies non* intervenes.

These special rules will be considered later. The meaning therefore of "not less than fourteen days before" is a matter of judicial interpretation, and in the opinion of the Court the same interpretation should be applied in the Colony as in England In England there can be no doubt that the expression has the same meaning as "fourteen clear days" that is to say both the first and the last days must be excluded (see *per* Chitty J. in *"In re Railway Sleeper Supply Company*, 29 Ch D. p. 204 at p. 207). *Prima facie*, therefore, the last day for filing the Memorandum of Appeal was not the 31st May, but the 30th May, which was in fact a Sunday.

In this Colony the Interpretation Ordinance provides for the intervention of a Sunday or other *dies non* in the computation of time. Section 3 (e) of the Ordinance applies when the limited period is less than six days, and section 3 (d) in other cases.

As the limited time is more than six days section 3 (d) is applicable and this sub-section reads as follows:

> "When any act or proceeding is directed or allowed to be done or taken in a Court or office on a certain day, then, if the Court or office is closed on that day, the act or proceeding shall be considered as done or taken in due time, if it is done or taken on the next succeeding day on which the Court or office is open."

Accordingly in the present case the filing of the Memorandum following the usual rules of construction should have taken place on the 30th May, but as this was a Sunday, the filing can be legally performed on the following day, namely, Monday the 31st May. The preliminary objection therefore is overruled.

On the substance of the appellant's case there is no doubt that, as in civil matters, bankruptcy costs are, under section 91 (1), in the discretion of the Court, and if the appellant had been granted his costs antecedent to the 30th April 1937 the Court of Appeal would not have interfered with the learned Acting Chief Justice's discretion to disallow the costs of that day. But costs usually follow the event and there was no material upon which a judicial discretion could be exercised to disallow the antecedent costs.

As regards the costs of the 30th April 1937 it is quite certain that the appellant could not have recovered his antecedent costs if he had not attended and asked for them, since he failed to obtain an order for such costs even when he did appear. In these circumstances his appearance on the 30th April 1937 was both necessary and proper.

The Court is of opinion therefore that the appeal should be allowed and that the appellant should have his costs of the application to set aside the Bankruptcy Notice including the costs of the hearing on the 30th April. The appellant will be entitled to the costs of the appeal. The costs will be taxed and the costs awarded to the respondent on the interlocutory applications will be set off. The deposit should be paid out to the appellant's solicitor on his personal undertaking to pay thereout the difference (if any) due to the respondent on such taxation and set off.

Appeal allowed.

Solicitor for the Appellant—*A. de Mello.*

Solicitors for the Respondent—*Donaldson & Burkinshaw.*